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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re the Marriage of ARTHUR
and POLINA TSATRYAN.

B269812

(Los Angeles County
Super. Ct. No. BD512645)

ARTHUR TSATRYAN,

Appellant,

v.

POLINA TSATRYAN,

Respondent.

APPEAL from an order of the Superior Court of Los Angeles County, Mark A. Juhas, Judge. Affirmed.

Arthur Tsatryan, in pro. per., for Appellant.

No appearance for Respondent.

This is the sixth appeal by Arthur Tsatryan in this marital dissolution action. His most recent appeal was from the

judgment of dissolution, which we affirmed. (*In re Marriage of Tsatryan* (Feb. 13, 2018, B265467) [nonpub. opn.].) Arthur¹ now appeals from an order denying his request to vacate the judgment, raising numerous challenges on the merits. However, because Arthur failed to serve his former spouse Polina with his request to vacate the judgment, the trial court lacked jurisdiction to consider his request. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

A. *The Marital Dissolution Proceedings*

Arthur and Polina were married on August 5, 1987. They separated on August 3, 2009, and Arthur filed a petition for dissolution of marriage on September 23, 2009. Arthur and Polina have three sons, including Alexander, who was a minor at the time Arthur filed for dissolution.

Following a three-day trial, on February 11, 2015 the trial court awarded Polina sole legal and physical custody of Alexander, with limited visitation by Arthur. Arthur appealed, and we affirmed. (*In re Marriage of Tsatryan* (Nov. 9, 2016, B262680) [nonpub. opn.].) The trial continued on April 2 and 3, 2015 with respect to division of the parties' property, child and

¹ As with our previous opinions in this matter, we refer to Arthur and Polina Tsatryan by their first names for the sake of convenience and clarity, intending no disrespect.

² In our discussion of the factual and procedural background of the case, we focus on the proceedings relevant to this appeal. We discuss the earlier proceedings leading up to the judgment of dissolution in *In re Marriage of Tsatryan* (Nov. 9, 2016, B262680) (nonpub. opn.).

spousal support, and other reserved issues. On May 21, 2015 the trial court issued its ruling and entered a judgment of dissolution. The trial court ordered Arthur to pay child support and denied Arthur's request for spousal support. The trial court found the parties' Santa Clarita property was community property and ordered the property be sold and the proceeds divided evenly, subject to equalization payments. The trial court also awarded Polina attorney's fees. Arthur again appealed, and we affirmed. (*In re Marriage of Tsatryan, supra*, B265467.)

B. *Arthur's Request To Vacate the Judgment*

On November 18, 2015 Arthur filed a notice of intent to take oral testimony at a hearing scheduled for January 8, 2016. He sought to examine the custodian of records for the County of Los Angeles, regarding payments and benefits paid to Polina during her employment; Polina, regarding her "fabrication and forgery of documents" and her financial condition since the separation; and Polina's attorney, Steven Fernandez, regarding his fabrication and forgery of documents and "fraud, deceiving and frivolous litigation." Arthur also intended to testify regarding the fraudulent activities of Polina and her attorneys.

On November 23, 2015 Arthur filed a request to vacate the judgment, setting the hearing for January 8, 2016.³ Arthur based his request on Code of Civil Procedure section 657, subdivisions

³ Arthur previously filed a motion to vacate the judgment on June 15, 2015, pursuant to Code of Civil Procedure section 657, subdivisions 1, 5, 6, and 7. However, the record does not show what action, if any, was taken on the motion, which is not before us on appeal.

1, 3, 4, 5, 6, and 7,⁴ and Family Code sections 2030 and 2032.⁵ Specifically, he claimed the trial court denied him access to an attorney; insufficient evidence supported the judgment; there was newly discovered evidence that Polina “perjured herself [in] all of her Income and Expense Declaration[s] and greatly reduce[d] her income, benefits and compensations”; the trial court admitted third party deposition testimony offered by Polina; the trial court gave no weight to Arthur’s witnesses; and the trial court ignored statutory and case law in rendering the judgment.

⁴ All further undesignated statutory references are to the Code of Civil Procedure. Section 657 provides that a verdict or other decision “may be modified or vacated . . . for any of the following causes, materially affecting the substantial rights of [a] party: [¶] 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. [¶] . . . [¶] 3. Accident or surprise, which ordinary prudence could not have guarded against. [¶] 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. [¶] 5. Excessive or inadequate damages. [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law. [¶] 7. Error in law, occurring at the trial and excepted to by the party making the application.”

⁵ Family Code sections 2030 and 2032 govern an award of attorney’s fees in a dissolution action. Under Family Code section 2030, subdivision (a)(1), the trial court “shall ensure” that all parties have access to legal representation and, when “necessary based on the income and needs assessments,” order one party to pay for the attorney’s fees incurred by the other party.

On November 24, 2015 Arthur filed a proof of service, stating Arthur's request to vacate the judgment and notice of intent to take oral testimony were served by mail on Fernandez at 429 Santa Monica Boulevard, #120, Santa Monica, CA 90401 (Santa Monica address) by Alexander Galstyan.

On December 30, 2015 Arthur filed a notice of nonopposition to his request to vacate the judgment. The proof of service stated Fernandez was served at the Santa Monica address. According to Arthur's supporting declaration, the envelope containing his request to vacate the judgment and notice of his intent to take oral testimony was addressed to Fernandez, and was later returned to Arthur unopened. A copy of the envelope was attached to Arthur's declaration. According to Arthur, the post office told him the law firm had its own "return to sender" stamp, which was different from the stamp the post office used.

C. *The Hearing on Arthur's Request To Vacate the Judgment*

At the January 8, 2016 hearing, Fernandez stated that although the Santa Monica address on the envelope was correct, he never received the request to vacate. He added that pursuant to Family Code section 215, "it's improper service anyway even if it's mail. But I never received it." The trial court agreed, stating, "[A]ccording to Family Code section 215, after entry of judgment, no modification of the judgment or order is valid unless any prior notice is served. Whether it's personally or not, it has to be served on her, not on the attorney of record."⁶

⁶ Family Code section 215, subdivision (a), provides that following a judgment of dissolution, notice of a request for

The trial court additionally found no “support in the law to set aside a judgment based on [Family Code sections] 2030 and 2032 because you didn’t get attorney’s fees.” But the court noted the “main problem with the motion is [its] timeliness.” The court added, “So there’s a bunch of different problems here. One, under [section] 657, this isn’t a timely request. Secondly, under Family Code section 215, service is inappropriate. And, third, even if [section] 657 was appropriate, number 4 says, ‘which the party could not, with reasonable diligence, have discovered and produced at trial.’ There’s no indication this information was suddenly just available.”

Arthur responded that “[w]hat it really looks to me right now like the court try to cover up [Polina] again.” The court allowed Arthur to argue the merits of his request. Arthur asserted he recently learned from a Web site on government employee salaries that Polina had underreported her income.⁷ He added he had just discovered this “by accident.” Arthur also complained that he had to represent himself because he was ordered to pay Polina’s attorney’s fees, and she never produced her tax return. Arthur noted there was no opposition to his request to vacate the judgment, and he objected to Polina and her attorney being present at the hearing. The trial court overruled this objection.

modification of the judgment or other order must be served on the party, not the attorney of record.

⁷ Exhibit 1 to Arthur’s request was a computer printout from a “FindTheData” Web site showing Polina’s salaries for the years 2011 through 2013. (<<http://state-employees.findthedata.com/d/a/Polina-Tsatryan>>, as of Nov. 11, 2015.)

The trial court found Arthur's request was untimely under section 657 because it was not filed within 15 days of mailing of the notice of entry of judgment or 180 days after entry of judgment, whichever is earlier.⁸ The trial court alternatively found the request was untimely even if it were treated as a motion for reconsideration under section 1008, which must be filed within 10 days after service (§ 1008, subd. (a)), or a motion to set aside the judgment under section 473, which must be filed within six months after entry of the judgment (§ 473, subd. (b)).⁹

However, the trial court noted Arthur's request was timely under Family Code section 2121, which allows the judgment to be set aside for fraud if the court finds "that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief." The trial court found Arthur's request was filed within one year of the date of discovery, as required by Family Code section 2122.¹⁰

⁸ The trial court correctly set forth the time limits under section 659, subdivision (a)(2), for filing a motion to vacate a judgment. Arthur filed his request on November 23, 2015, approximately six months after mailing by the clerk on May 21, 2015 of the notice of entry of judgment. Arthur does not contend otherwise.

⁹ Arthur did not argue the judgment was void under section 473, subdivision (d).

¹⁰ Family Code section 2121, subdivision (a), provides for relief from a judgment in a dissolution proceeding "adjudicating support or division of property, after the six-month time limit of Section 473 . . . has run" Family Code section 2121, subdivision (a), provides that a motion based on fraud must be brought within one year after the date the complaining party

Arthur relied on two exhibits to his request to vacate the judgment—exhibit 1 printed from a Web site showing Polina’s base salary for 2013 at \$73,319 and total compensation at \$106,376, and Polina’s August 2013 income and expense declaration, attached as exhibit 4, that showed Polina’s yearly income at \$73,457.04 per year. The trial court pointed out that the base salary on exhibit 1 of \$73,319 was comparable to the yearly salary she reported on her income and expense declaration.¹¹ Arthur responded that exhibit 1 also showed Polina’s total compensation was \$106,000, and argued this amount would affect the court’s child support award.

The trial court concluded Arthur had not shown under Family Code section 2121, subdivision (b), “that the facts alleged as the grounds for relief materially affect the original outcome and that the moving party would materially benefit from the granting of the relief.” The court stated, “[T]here’s no indication as to what the difference between the base salary and [Polina’s] total compensation is. And so the fact that, for example, if she has matching 401(k)s and some other things, . . . that wouldn’t go

discovered or should have discovered the fraud. However, under subdivision (b), “before granting relief, the court shall find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief.” Family Code section 2122 sets forth the grounds for relief, including actual fraud and perjury.

¹¹ The trial court orally calculated Polina’s yearly salary as reported on her income and expense declaration as \$73,452 based on her stated monthly income of \$6,121.42. With the benefit of a calculator, we note that Polina’s yearly salary as reported was \$73,457.04.

into the guideline numbers in any event. [¶] And so there's insufficient evidence to show that there's a material difference. So I'm going to deny it."¹²

The court signed and filed an order denying Arthur's request to vacate the judgment. Arthur timely appealed.¹³

DISCUSSION

The trial court denied Arthur's request in part on Arthur's failure to serve Polina with his request to vacate the judgment. The trial court was correct. Family Code section 215, subdivision (a), provides: "Except as provided in subdivision (b) or (c), after entry of a judgment of dissolution of marriage, . . . no modification of the judgment or order, and no subsequent order in the proceedings, is valid unless any prior notice otherwise required to be given to a party to the proceeding is served, in the same manner as the notice is otherwise permitted by law to be

¹² The trial court did not allow the witness from the County of Los Angeles to testify because Arthur failed to serve Polina with a notice to consumer, as required by sections 1985.3 and 1985.6. The court made a finding of good cause to refuse to allow live testimony from other witnesses, finding credibility was not an issue. (See Fam. Code, § 217, subd. (b).)

¹³ Tsatryan has filed a proof of service of the notice of appeal, showing service by mail on Fernandez at the Santa Monica address. Polina has not filed a respondent's brief. On December 22, 2016 this court received a copy of the trial court's November 7, 2016 order granting Fernandez's motion to be relieved as counsel. Pleadings after that date, including notices from this court, have been served on Polina.

served, upon the party. For the purposes of this section, service upon the attorney of record is not sufficient.”

Arthur does not dispute on appeal that he failed to serve Polina with his request to vacate the judgment. “Respondent’s failure to serve appellant with notice of the [postjudgment] motion is the equivalent of failure to serve summons and complaint, which renders a judgment void on its face and subject to collateral attack at any time.” (*In re Marriage of Kreiss* (1990) 224 Cal.App.3d 1033, 1039-1040 [interpreting statutory predecessor to § 215]; accord, *In re Marriage of Roden* (1987) 193 Cal.App.3d 939, 943 [order for continued spousal support invalid where party served opposing counsel instead of party, interpreting predecessor statute to § 215].)

By failing to address this issue in his opening brief, Arthur has forfeited any argument that Polina was properly served, or that she waived the failure to serve her by her appearance with her attorney at the hearing.¹⁴ (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [“Plaintiff has not raised this issue on appeal, however, and it may therefore be deemed waived.”]; *Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19

¹⁴ Although some courts have found in limited circumstances a party may waive lack of proper service on the party where the attorney accepted service of an adequate notice (see *In re Marriage of Roden, supra*, 193 Cal.App.3d at p. 944; *In re Marriage of Askren* (1984) 157 Cal.App.3d 205, 211), here Fernandez did not accept service and appeared at the hearing to object to improper service. Further, it is undisputed that Fernandez did not have actual notice of Arthur’s request until he received the notice of nonopposition.

Cal.App.5th 1127, 1136 [appellant forfeited challenge to issue not raised on appeal].)¹⁵

In addition, because Arthur only appealed from the trial court's January 8, 2016 denial of his request to vacate the May 21, 2015 judgment, we do not have jurisdiction to consider the trial court's April 27, 2016 denial of Arthur's March 14, 2016 request to vacate the same judgment, as urged by Arthur.¹⁶ (*Faunce v. Cate* (2013) 222 Cal.App.4th 166, 170 ["We have no jurisdiction over an order not mentioned in the notice of appeal."]; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 706 ["The appeal reviews the correctness of the judgment or order as of the time of

¹⁵ Because we affirm the trial court's ruling based on improper service, we do not reach Arthur's other contentions. We also deny Arthur's January 3 and April 19, 2017 requests for judicial notice of documents missing from the court file as unnecessary to our resolution of this appeal. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [judicial notice denied where "the requests present no issue for which judicial notice of these items is necessary, helpful, or relevant"]; *Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 342, fn. 6 [judicial notice denied where materials are not "relevant or necessary" to the court's analysis]; *San Diego City Firefighters, Local 145 v. Board of Administration etc.* (2012) 206 Cal.App.4th 594, 600, fn. 3 [judicial notice denied because "the document at issue is not necessary to our resolution of this appeal"].)

¹⁶ Similarly, Arthur's challenges to the trial court's June 30, 2011 and June 4, 2012 denial of his request for attorneys' fees, Polina's asserted discovery violations, and the trial court's failure on September 16, 2014 to find Polina in contempt are not properly before us.

its rendition, leaving later developments to be handled in subsequent litigation.”].)

DISPOSITION

The order is affirmed. Appellant is to bear his own costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.